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ALEXANDER L. STEVAS,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

Richard C. Kaiser,

Petitioner,

v.

Consolidated Rail Corporation and
Brotherhood of Locomotive Engineers,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

**BRIEF OF RESPONDENT CONSOLIDATED
RAIL CORPORATION IN OPPOSITION**

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QUESTION PRESENTED

A dispute arose between a railroad employee and his employer railroad over the interpretation of the applicable collective bargaining agreement. The employee instituted a breach of contract action against the railroad in the United States District Court, which properly was dismissed for lack of subject matter jurisdiction. The employee, with the assistance of counsel, progressed the dispute to the National Railroad Adjustment Board (NRAB) which denied the employee's claim on the merits. While progressing his dispute to the NRAB the employee instituted a second breach of contract action against the employer railroad, which was barred under the doctrines of collateral estoppel and *res judicata* by the earlier decision involving the same parties and issues. The question presented is: whether the Court of Appeals correctly held that the doctrines of collateral estoppel and *res judicata* barred the second breach of contract action against the employer railroad.

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OPINION BELOW

On April 17, 1981, the United States District Court for the Northern District of Ohio, Western Division, issued an Opinion and Order ("the 1981 decision") granting a motion to dismiss of Consolidated Rail Corporation ("Conrail"), f/k/a Penn Central Transportation Company ("Penn Central") and also a motion for summary judgment of the Brotherhood of Locomotive Engineers ("BLE"). The ruling of the trial court on Conrail's motion to dismiss was premised on a finding that lack of subject matter jurisdiction over the same controversy had been determined, as a matter of law, in a prior District Court action filed in 1975 against Penn Central Transportation Company ("the 1975 action"). Copies of the two District Court opinions are appended to the Petition for Writ of Certiorari and are included in the record before the Sixth Circuit Court of Appeals.¹

The 1981 decision also found that Petitioner's action constituted an impermissible collateral attack on proceedings before the National Railroad Adjustment Board ("NRAB" or "Board"), and that the Petitioner's remedy, if aggrieved by the NRAB decision, was to file a petition for review in the District Court, which he did not do.

Pursuant to Rule 19 of the United States Court of Appeals for the Sixth Circuit, the 1981 decision was

¹ By letter dated December 27, 1982, counsel for petitioner stated that he would forward to the Supreme Court with the Petition for Certiorari copies of the joint appendix used in the Court of Appeals. Petitioner has failed to file the joint appendix. Accordingly, Conrail will refer to the appendix before the lower court using references "CA App."

affirmed from the bench and a brief Order issued. (Pet. App. A)² From this Order, petitioner now seeks certiorari.

QUESTIONS PRESENTED

The only question presented, with respect to Petitioner's cause of action against his former employer, is whether the 1981 decision, as affirmed by the Court of Appeals, was correct in holding that the doctrines of collateral estoppel and *res judicata* foreclosed Petitioner from relitigating his 1975 cause of action for breach of the employment contract.

Petitioner asserts that three questions are raised by the 1981 decision and by the affirmance of that decision by the Court of Appeals. Petitioner's first question, however, misstates the grounds for dismissal by the lower court in the 1981 decision, with the result that petitioner's second question, relating to an alleged conflict among the circuits, is incorrect. There is no conflict among the relevant decisions on *res judicata* and collateral estoppel. Petitioner's brief does not appear to address the third question, concerning the requirements of due process.

STATUTES INVOLVED

The statute involved is the Railway Labor Act, and specifically 45 U.S.C. §153 (i), which is set forth below:

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application

² References "Pet. App." are to the Appendix attached to the Petition.

of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

Conrail adopts the Statement of the Case set forth by respondent BLE, adding the following facts which are pertinent to the lower court's application of the doctrine of collateral estoppel.

The first of two court proceedings instituted by the petitioner was an action filed against the Penn Central on December 5, 1975 (the 1975 action) in the United States District Court for the Northern District of Ohio, No. 75-480 (CA App. 16-18). Petitioner alleged a cause of action for breach of the employment contract, seeking both damages and reinstatement. Subsequently, in the same action petitioner amended his complaint (CA App. 24) to include an allegation of breach of the Union's duty of fair representation, although Petitioner did not name the BLE as a party defendant. The District Court granted Penn Central's motion to dismiss the complaint for lack of subject matter jurisdiction, and issued an Opinion and Order of August 5, 1976 (the 1976 decision), finding that Petitioner's cause of action involved a "minor dispute" over the interpretation of the terms of the

collective bargaining agreement and that the NRAB had exclusive jurisdiction to resolve the dispute. In reaching this conclusion the District Court specifically considered the doctrine of *Glover v. St. Louis - San Francisco Railway*, 393 U.S. 324 (1969) and found it inapplicable.³ (CA App. 22). The trial court's dismissal of Petitioner's cause of action was *not* predicated on failure to join an indispensable party, but rather on lack of subject matter jurisdiction. (CA App. 20). The 1976 decision never was appealed.

Thereafter, Petitioner filed a claim for wrongful termination with the NRAB, which claim was processed fully and investigated. However, prior to receiving a decision from the Board, Petitioner, on December 5, 1979, filed a second action (the 1979 action) in the United States District Court for the Northern District of Ohio, reasserting a claim for breach of contract against Penn Central, through its statutory agent Conrail, and against the BLE for breach of its duty of fair representation. The only difference between the 1975 action and the 1979 action (of which the present petition is an outgrowth) was Petitioner's formal designation of the BLE as a party defendant in the second action.

Conrail filed a motion to dismiss petitioner's 1979 action on the ground that, under the doctrines of *res judicata* and collateral estoppel, his claim for breach of the employment contract was barred by the 1976

³ In the 1976 decision the court notes that "Plaintiff nevertheless contends that there is an exception to this rule when there is an allegation that the union has breached its duty of fair representation to the employee. For this proposition he cites, *inter alia*, *Glover v. St. Louis-San Fran. Ry.*, 393 U.S. 324 (1969)."

decision. In the 1981 decision the district court granted Conrail's motion, applying the doctrine of collateral estoppel to two issues: (1) whether the cause of action constituted a "minor dispute" within the meaning of the Railway Labor Act so as to limit petitioner's remedy to a proceeding before the NRAB; and (2) whether, if the dispute was "minor," the *Glover* doctrine nevertheless protected petitioner's access to the district court. Finding that the cause of action was the same as that advanced in the 1975 action the lower court held that both issues previously had been resolved against the petitioner and that dismissal of the suit against Penn Central would "fully effectuate the purposes of the doctrine of collateral estoppel." (CA App. 8). Nothing in the 1981 decision or the order of the Court of Appeals supports petitioner's present assertion that the lower court's decision was based on petitioner's failure to join an indispensable party.

ARGUMENT

REASONS FOR DENYING THE WRIT

This case involves no questions of law that are novel or worthy of review.

The first and second questions of the three posed by the petitioner mischaracterize both the 1976 and 1981 decisions and, therefore, miss the point that the 1981 decision was predicated solely on *res judicata* and collateral estoppel. No conflict exists among the circuits on these doctrines as applied to this controversy. Petitioner's third question regarding due process in the context of a "minor dispute" involving discharge from employment because of failure to pass a promotional exam has been resolved by this Court in favor of adherence to the exclusive administrative grievance

procedure mandated by the Railway Labor Act. *Union Pacific Railroad v. Sheehan*, 439 U.S. 89 (1978); *Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320 (1972).

Because the Petition raises no novel federal question, is consistent with prior decisions of this Court and involves no issue of dispute among the circuits, it should be denied.

I. The Facts Established by the Record Below Clearly Demonstrate that Petitioner's Cause of Action, Involving a "Minor Dispute" for Which Exclusive Jurisdiction Lay in the National Railroad Adjustment Board, was Barred, under the Doctrines of Collateral Estoppel and Res Judicata, by an Earlier Decision Involving the Same Parties and Issues.

In the District Court and the Court of Appeals Conrail, as Penn Central's statutory agent, raised the defenses of *res judicata* and collateral estoppel. The Opinion and Order of the trial court limited its discussion to the doctrine of collateral estoppel; but because the findings and ultimate decision to dismiss Conrail as a party were based on a determination that Petitioner's cause of action was barred by the 1976 decision, Conrail believes that a brief discussion of *res judicata* is also necessary for a complete review of the propriety of the District Court's dismissal.

The doctrine of *res judicata* bars a second suit when a judgment on the merits has been rendered in a prior action involving the same cause of action and the same parties or their privies. *Costello v. United States*, 365 U.S. 265 (1961); *Cromwell v. County of Sac*, 94 U.S. 351 (1876); *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710 (2d Cir. 1977);

All States Investors, Inc. v. Sedley, 399 F.2d 769 (6th Cir. 1968); *Acree v. Air Line Pilots Association*, 390 F.2d 199 (5th Cir. 1968), *cert. denied*, 393 U.S. 852 (1968); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). This Court has held that the principles of *res judicata* apply to questions of jurisdiction as well as to decisions on the merits. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932). See also *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931). When the prior judgment is not on the merits, the *res judicata* bar is conclusive only as to the issues that actually were adjudged. See *Acree v. Air Line Pilots Association*, *supra*, 390 F.2d at 203.

The 1981 decision clearly and unequivocally sets forth each requisite finding for application of the doctrine of *res judicata*. In both the 1975 and 1979 actions, petitioner stated the same cause of action (breach of the collective bargaining agreement) based on the same allegations. In both actions the party asserting the defense was the same, namely Conrail.⁴ In both actions the same right (Petitioner's right not to be wrongfully discharged) was allegedly infringed by the same wrong (Petitioner's termination for failure to pass the promotional exam). Not only would the same evidence sustain both judgments, but the lack of subject matter jurisdiction would again be conclusive in the second action. It readily may be

⁴ The addition of the Brotherhood of Locomotive Engineers as defendant to the 1979 action does not upset the balance, as the union is not implicated in Count I of the Complaint and the Penn Central is not implicated in Count II. The prior judgment is to be applied only to Count I of the complaint, Petitioner's claim of breach of contract by the Penn Central.

inferred, from the brief discussion in the 1981 decision of the NRAB's exclusive jurisdiction over "minor disputes," that had it been necessary, the Court would have reached the same conclusion as did the trial court in Petitioner's prior action. (CA App. 8). The only conclusion, however, which could be, and was, reached by the trial court below was that the two separate lawsuits were identical and that the unappealed 1976 decision was determinative on the issue of subject matter jurisdiction, thereby rendering dismissal in the present action mandatory.

Even if the trial court had found a new cause of action to be stated against Penn Central in the second complaint, application of the doctrine of collateral estoppel to the prior court's finding that subject matter jurisdiction was lacking would lead to the same result, dismissal of the complaint as to Conrail. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the primary litigation." *Montana v. United States*, 440 U.S. 147 (1979). See *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). In the 1975 action, the trial court found Petitioner's claim to be one against his former employer over differing interpretations of the collective bargaining agreement. The Court in that proceeding was "... satisfied that the dispute involved herein is a 'minor' dispute within the exclusive jurisdiction of the Railroad Adjustment Board, and that the defendant's [respondent's] motion should be granted." (CA App.20). The same complaint, supported by the same allegations and involving the same

legal issues and the same parties, is involved in the action now pending before this Court. Accordingly, Petitioner is foreclosed from relitigating the jurisdictional issue in this action.

Furthermore, no change in the controlling facts or legal principles occurred between the two suits which would have created an exception to the doctrines of *res judicata* and collateral estoppel. *Montana v. United States*, 440 U.S. at 155. During the interim period Petitioner processed his claim through the grievance procedure provided under the collective bargaining agreement and received, with the assistance of counsel, a full hearing before the NRAB. At the time he filed his second cause of action the Board had not yet issued its opinion on the merits. Subsequently, after issuance of the 1981 decision and after Petitioner had filed his appeal with the Sixth Circuit, the NRAB released its decision denying Petitioner's claim on the merits. (CA App. 68).

Petitioner, dissatisfied with the NRAB decision on the merits and the 1981 decision, seeks to avoid the doctrine of collateral estoppel by arguing that it is a judicial doctrine "modernized to achieve substantial justice," and by averring that "[i]n the instant case substantial justice is not being served." (Petition, pp. 11-12). This constitutes the second attempt by the Petitioner to challenge his dismissal. Petitioner has had not only the opportunity to raise the same issues in a prior judicial action and to appeal the judgment in that action (which he did not do) but also the opportunity to pursue his claim with the assistance of counsel through the grievance procedure provided by the collective bargaining agreement pursuant to the Railway Labor Act. The decision of the NRAB is final

and binding, absent an appeal to the District Court on very narrow grounds, *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 93 (1978), an appeal which was not prosecuted. Thus, more than substantial justice has been done Petitioner, and his conclusory argument to the contrary must fail. The case at bar epitomizes the policy and purposes of *res judicata* and collateral estoppel.

As this Court and other courts have often recognized, *res judicata* and collateral estoppel relieve parties of the cost of vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

Montana v. United States, 440 U.S. 147, 153-154 (1979). Accordingly, the trial court properly found that Petitioner was barred from relitigating his claim for breach of contract against Conrail, as statutory agent for Penn Central, in the action now pending before this Court.

II. There Is No Conflict Between the Opinion and Order of the Trial Court Below, the Decisions of This Court and the Decisions of Other Circuits.

Petitioner purports to find a conflict among the circuits. However, in view of the facts that (1) the trial court in the 1975 action specifically addressed the *Glover* doctrine, (2) no appeal was taken from the 1976 decision, and (3) the 1981 decision was based on *res judicata*, the dispute among the circuits to which Petitioner calls attention as to the applicability of the *Glover* doctrine is not germane to resolution of the issues at bar. As noted by this Court in *Allen v. McCurry*, this Court has long recognized and applied the doctrines of collateral estoppel and *res judicata* when the causes of action, the supporting allegations,

the legal issues and the parties are identical. *Montana v. United States*, 440 U.S. at 147; *Costello v. United States*, 365 U.S. 265 (1961); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). The only issue arising from the trial court's dismissal of petitioner's cause of action against Conrail is whether the doctrine of collateral estoppel and/or *res judicata* was properly applied, and on this issue there is no conflict.

CONCLUSION

The Petition for Writ of Certiorari should be denied because petitioner argues issues which do not arise from the trial court's Opinion and Order below, because no substantial issue is raised, and because there is no conflict among the Circuits over application of the doctrine of collateral estoppel, which is the sole issue necessary to resolve Petitioner's claim against respondent Conrail, as statutory agent for Penn Central.

Respectfully submitted,

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